Filed 7/24/03 In re Raven S. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re RAVEN S., a Person Coming Under the Juvenile Court Law.	B164003 (Los Angeles County Super. Ct. No. CK45816)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. GLENN S., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Zeke Zeidler, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Jesse F. Rodriguez, under appointment by the Court of Appeal, for Defendant and Appellant.

Lloyd W. Pellman, County Counsel, and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

Glenn S., the father of Raven S., appeals from orders of the juvenile court pursuant to Welfare and Institutions Code section 366.26[1] terminating his parental rights and, although adoption was selected as the permanent plan for Raven, granting the prospective adoptive parents legal guardianship as to Raven pending finalization of the adoption. Glenn S. contends he was not provided proper notice of the section 366.26 hearing and also asserts the juvenile court lacked authority to concurrently terminate parental rights and appoint a legal guardian for Raven. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Two-year-old Raven was declared a dependent child of the juvenile court under section 300, subdivision (b), in November 2001 based on the court's finding that she had been exposed to domestic violence between her parents, both parents had a history of marijuana use and had demonstrated mental and emotional problems and Glenn S. had allowed Raven to consume alcohol from a wine bottle when she was one year old, all of which endangered her physical and emotional health and safety and created a detrimental home environment. Raven was removed from her parents' custody, and the juvenile court ordered reunification services for both parents, permitting only monitored visits with Raven.

Glenn S. and Raven's mother Dee-Anna S. are married but separated. At the time of Raven's initial detention she and Dee-Anna S. lived in Texas, but were visiting Glenn S., who had moved from Texas to Southern California earlier in 2001. Following Raven's detention, Dee-Anna S. returned to her home in Texas; Glenn S. moved back to Texas (to his mother's home) prior to the November 2001 disposition hearing. In February 2002 Raven was placed by the juvenile court with her maternal aunt and uncle in Texas.[2]

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[1] All statutory references are to the Welfare and Institutions Code.

[2] The Texas child welfare authorities agreed to the Los Angeles County Juvenile Court's retention of jurisdiction over Raven throughout these proceedings.

At the conclusion of a contested review hearing pursuant to section 366.21, subdivision (e), in June 2002, the juvenile court found both Glenn S. and Dee-Anna S. had failed to participate regularly and make substantive progress in their court ordered treatment plans and accordingly terminated family reunification services for both parents. The court further found there was a possibility of guardianship or adoption by the maternal aunt and uncle and set a hearing for October 15, 2002 pursuant to section 366.26 for the selection and implementation of a permanent plan for Raven.

The report prepared by the Los Angeles Department of Children and Family Services (Department) for the section 366.26 hearing identified Raven's maternal aunt and uncle, her then-current caregivers, as prospective adoptive parents and recommended that parental rights be terminated and Raven placed for adoption: "Raven [S.] is very attached to her current caregivers . . . who are eager to provide her with a permanent nurturing home through adoption. It is strongly believed that for all of the above reasons, adoption is the best plan for Raven . . . ." The report also explained that the out-of-state adoptive home study necessary for the maternal aunt and uncle could not be completed until parental rights had been terminated.

Glenn S. received notice of the section 366.26 hearing scheduled for October 15, 2002 by certified mail on June 27, 2002. Neither Glenn S. nor Dee-Anna S. appeared at the hearing. At the request of Glenn S.'s counsel, the court continued the matter to November 18, 2002 for a contested hearing pursuant to section 366.26 "to have time to contact his clients [*sic*] regarding their desires and for them to come out from Texas if they are opposing the recommendation." The court expressly found that notice was proper for the October 15, 2002 hearing and directed counsel to provide notice to their respective clients of the continued hearing date.

Once again at the hearing on November 18, 2002 neither parent appeared. Counsel for Glenn S. explained to the court that he had sent Glenn S. a letter regarding the continuance of the section 366.26 hearing, but now realized his letter incorrectly advised Glenn S. that the new hearing date was November 11, 2002 (a court holiday),

rather than the correct date of November 18, 2002. Counsel also stated he had had no direct contact with Glenn S. since sending the letter. Counsel had unsuccessfully attempted to reach Glenn S. through the paternal grandmother, with whom Glenn S. was living, and twice left messages on her answering machine that he needed to speak to Glenn S. In light of this lack of contact with his client, Glenn S.'s counsel requested a continuance. The court denied the request, noting it had found notice proper for the original section 366.26 hearing on October 15, 2002 and concluding that any further notice was simply a courtesy to allow Glenn S. to appear at the hearing if he wished.

Based on the evidence before it, the court found by clear and convincing evidence that return of Raven to her parents would be detrimental and that she is adoptable. Accordingly, the court terminated the parental rights of Glenn S. and Dee-Anna S. The court further found that it was in the best interests of Raven for guardianship to be granted pending the finalization of the adoption. The prospective adoptive parents, Raven's maternal aunt and uncle, were appointed her guardians. The court additionally ordered the Department to request an adoptive home study from Texas as to the maternal aunt and uncle.

Glenn S. filed a timely notice of appeal.

DISCUSSION

1. *Glenn S. Received Adequate Notice of the Section 366.26 Hearing*

Former section 366.23, subdivision (a), which applied to the selection and implementation hearings held in this case,[3] contained detailed requirements for notifying parents when the juvenile court set a section 366.26 hearing. "Parents are entitled to special notice of a section 366.26 hearing pursuant to section 366.23, which specifies in

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[3] Effective January 1, 2003, former section 366.23 was repealed and replaced by section 294. (Stats. 2002, ch. 416, § 16.) New section 294 and other provisions of Senate Bill No. 1958 (2001-2002 Reg. Sess.) were intended to "reduce local court costs by clarifying and consolidating existing requirements [for notice in dependency proceedings] so as to reduce the number of continuances that need to be granted." (Stats. 2002, ch. 416, § 13.)

considerable detail the necessary contents, timing, and methods for service of the notice." (*In re Angela C*. (2002) 99 Cal.App.4th 389, 392 (*Angela C*.).)[4] Glenn S. does not dispute the juvenile court's finding he was properly served with notice, pursuant to former section 366.23, of the original section 366.26 hearing set on October 15, 2002, a hearing he failed to attend.

At the request of Glenn S.'s appointed counsel, the court on October 15, 2002 continued the hearing to November 18, 2002 to give his lawyer "time to contact his clients regarding their desires and for them to come out from Texas if they are opposing the recommendation." Emphasizing that his lawyer's subsequent letter contained an incorrect hearing date, Glenn S. now argues he did not receive proper notice of the continued hearing and was thereby deprived of his right to present evidence on the issue of termination of parental rights.

Several appellate courts have held an absent parent must be notified if a section 366.26 hearing is continued. (E.g., *In re Phillip F*. (2000) 78 Cal.App.4th 250, 258-259 (*Phillip F*.); *In re Malcolm D.* (1996) 42 Cal.App.4th 904, 913 (*Malcolm D*.).) However, that notice need not comply with the strict requirements of former section 366.23, provided the notice given satisfies due process (*Angela C*., *supra*, 99 Cal.App.4th at p. 392; *Phillip F.*, at pp. 258-259) -- that is, the notice is reasonably calculated under all the circumstances to apprise the interested parties of the pendency of the action and

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[4] Former section 366.23, subdivision (a), provided in part: "Whenever a juvenile court schedules a hearing pursuant to Section 366.26 . . . it shall direct that the fathers, presumed and alleged . . . shall be notified of the time and place of the proceedings and advised that they may appear. The notice shall also advise them of the . . . nature of the proceedings, and of the requirement that at the proceedings the court shall select and implement a plan of adoption, legal guardianship, or long-term foster care for the minor. . . . Service of the notice shall be completed at least 45 days before the date of the hearing . . . . If the petitioner is recommending termination of parental rights, notice of this recommendation shall be either included in the notice of a hearing scheduled pursuant to Section 366.26 and served within the time period specified in this subdivision or provided by separate notice . . . by first-class mail at least 15 days before the scheduled hearing."

provide those parties an opportunity to object. (*In re Anna M.* (1997) 54 Cal.App.4th 463, 468; *In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1418.) In the context of a continued section 366.26 hearing, where proper notice has been provided in the first instance, "actual notice of the continued hearing date will suffice." (*Phillip F.*, at p. 259.)[5]

Seeking to rely on selected language from the court's opinion in *Phillip F.*, *supra*, 78 Cal.App.4th 250, Glenn S. argues there was neither direct evidence he had received actual notice of the continued hearing date nor any reasonable basis to infer that such notice had been provided. Accordingly, he asserts the juvenile court improperly proceeded to terminate parental rights in his absence on November 18, 2002. Glenn S.'s argument misapprehends the significance of *Phillip F.*

In *Phillip F.* Anna S. appealed from the order terminating parental rights to her two sons. The selection and implementation hearing had been originally scheduled pursuant to section 366.26 for December 29, 1998. (*Phillip F.*, *supra*, 78 Cal.App.4th at p. 254.) Anna S. received proper notice of that hearing. On the December 29, 1998 hearing date, however, the court continued the hearing to March 16, 1999 to permit the Kern County Department of Human Services to notify the children's father of the proceedings by publication. Anna S.'s counsel, but not Anna S. herself, was present

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[5] Case law under former section 366.23 has recognized the propriety of notice of a continued section 366.26 hearing by first class mail to the parent, written notice from the parent's attorney or oral notice in court. (*Phillip F.*, *supra*, 78 Cal.App.4th at p. 259; *Malcolm D.*, *supra*, 42 Cal.App.4th at p. 913.) Section 294, subdivision (d), effective as of January 1, 2003, provides that notice of a continued section 366.26 hearing may be given by first-class mail to the parent's last known address if the Department's recommendation for a permanent plan has not changed: "Regardless of the type of notice required, or the manner in which it was served, once the court has made the initial finding that notice has properly been given to the parent, . . . subsequent notice for any continuation of a Section 366.26 hearing may be by first-class mail to any last known address. However, if the recommendation changes from the recommendation contained in the notice previously found to be proper, notice shall be provided to the parent . . . regarding that subsequent hearing."

when the court continued the hearing to March 16, 1999 and again when the matter was continued to April 2, 1999 for a contested hearing. (*Ibid*.) At the hearing on April 2, 1999 the juvenile court found that both children were likely to be adopted, ordered parental rights terminated and selected adoption as the permanent plan. (*Id.* at p. 255.)

On appeal Anna S. asserted the juvenile court erroneously found she had sufficient notice of the continued hearing, noting that she had not been present on December 29, 1998 when the matter was initially continued and the mailed notice of the continued hearing date was sent to her former residence although she had advised the court of her new address. (*Phillip F.*, *supra*, 78 Cal.App.4th at p. 256.) She also argued that, although the court assumed her counsel would advise her of the continued hearing date, the record did not establish that she had actual notice of the new date. (*Ibid*.) The Court of Appeal affirmed the finding that notice was proper. "While there is no direct evidence of such notice, the court could have inferred that appellant had actual notice of the continued hearing because her appointed counsel had notified her of the continued hearing dates in conformance with counsel's statutory obligation to provide competent representation. (§ 317.5, subd. (a).)" (*Id*. at p. 259.) The court explained such an inference of actual notice was reasonable, and therefore proper, in light of the circumstances of the case. (*Ibid*.)

A similar inference of actual notice is reasonable in this case, as well. First, there is no question that Glenn S. received actual notice that the October 15, 2002 hearing date had been continued. His argument is simply that the record does not indicate he had actual knowledge of the November 18, 2002 date itself (rather than the incorrect date of November 11, 2002). However, Glenn S.'s lawyer acknowledged that, following the continuance to November 18, 2002, he left two telephone messages for Glenn S. at his mother's home (Raven's paternal grandmother) -- where it was conceded Glenn S. was staying -- stating he needed to speak to Glenn S. regarding the permanent planning hearing. In requesting that the matter again be continued, Glenn S.'s lawyer never asserted he had not communicated the correct hearing date in those two telephone

messages and never claimed his client did not actually know when the new hearing would take place. (Indeed, no such claim is made on appeal.) In addition, as the juvenile court noted, there was no indication Glenn S. attempted to appear or otherwise participate in the section 366.26 hearing on the November 11, 2002 date contained in counsel's letter. Under all these circumstances, it was reasonable for the court to conclude that Glenn S. had sufficient notice of the continued hearing date.[6]

Even were we to conclude Glenn S. did not receive sufficient notice of the continued section 366.26 hearing, we nonetheless would find any defect in notice was harmless beyond a reasonable doubt. (*Angela C.*, *supra*, 99 Cal.App.4th at pp. 394-395 [lack of notice of continuance of termination hearing is "in the nature of trial error," not structural error, and thus its impact is assessed under the *Chapman* harmless error standard].) There is absolutely no doubt Raven was likely to be adopted, and no evidence in the record could support a finding that termination of parental rights would be detrimental to her best interests. (§ 366.26, subd. (c)(1)(A); see *In re Matthew C.* (1993) 6 Cal.4th 386, 392 [when minor adoptable and declining to apply one of the statutory exceptions would not cause detriment to the child, the decision to terminate parental rights is relatively automatic].) Glenn S.'s counsel failed even to make an offer of proof regarding the quality of Glenn S.'s visits with Raven or the purported benefit to Raven of continuing a relationship with him. (See *In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1122 [trial court may require offer of proof before conducting contested hearing on one of the statutory exceptions to termination of parental rights]; *Maricela C. v. Superior*

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[6] We are not entirely convinced the court in *Phillip F.* correctly held a parent who is represented by counsel and fails to appear at the properly noticed section 366.26 hearing must be renoticed for the continued hearing date, particularly where, as here, it was the absent parent's own lawyer who requested the continuance precisely on the ground that the parent, although given proper notice, was not present. However, in light of our holding that an inference of actual notice to Glenn S. is reasonable, we leave the issue for another case and another day.

Court (1998) 66 Cal.App.4th 1138, 1147-1148 [mother's offer of proof insufficient to require juvenile court to set a contested section 366.26 hearing].)

2. *The Juvenile Court Properly Granted a Petition for Legal Guardianship Pending Finalization of Raven's Adoption*

Glenn S. concedes, as he must, that the juvenile court's concurrent orders terminating his parental rights and granting legal guardianship to Raven's caregivers and prospective adoptive parents pending finalization of Raven's adoption are expressly authorized by section 366.26, subdivision (j), when approved by the Department: "If the court, by order or judgment declares the child free from the custody and control of both parents . . . , the court shall at the same time order the child referred to the State Department of Social Services or a licensed adoption agency for adoptive placement by the agency. . . . With the consent of the agency, the court may appoint a guardian of the child, who shall serve until the child is adopted." Concurrent orders have also been approved by the Supreme Court: "In the absence of an express provision depriving the court of power to appoint a guardian of a child that has been validly relinquished for adoption, we do not believe that the adoption statutes may reasonably be interpreted as depriving such a child of the protection afforded by guardianship proceedings in a proper case." (*Guardianship of Henwood* (1958) 49 Cal.2d 639, 644 (*Henwood*).)[7]

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[7] "A child cannot be in the custody of a guardian subject to the control of the court and at the same time be in the custody and control of the agency. In any given case the right to custody must rest with one custodian or the other for no machinery is provided whereby it may be divided between them. Neither in the statutes with respect to guardianship nor in those with respect to adoption, however, has the Legislature expressly provided which should prevail. [¶] . . . [¶] Our conclusion that the adoption statutes do not preclude the appointment of a guardian for a validly relinquished child does not mean that the court may ignore the adoption procedures and supersede them by the appointment of a guardian on grounds that, absent relinquishment to a licensed agency, might support the conclusion that the appointment of a guardian was necessary or convenient. [Citation.] The statutory provisions can be reconciled and effect given to both statutory schemes for protecting the welfare of the child only if the requirement of necessity or convenience for the appointment of a guardian is interpreted in the light of the agency adoption provisions in the case of relinquished children. Only in this way is it possible not only to prevent abuses of the adoption procedure but also to protect that

Nonetheless, citing *Department of Social Services v. Superior Court* (1997) 58 Cal.App.4th 721, 738-739 [juvenile court may not direct Department to place legally freed child in a specific pre-adoptive home], Glenn S. asserts the order granting legal guardianship is fatally inconsistent with the Department's exclusive authority to place children once they have been referred to it for adoptive planning and placement. Thus, he argues, the concurrent orders violate the statutory scheme for adoption.[8]

The short answer to Glenn S.'s argument is that section 366.26, subdivision (j), which is the statutory source for the Department's right "to the exclusive care and control of the [legally freed] child at all times until a petition for adoption is granted," is the same provision that authorizes the juvenile court to appoint a legal guardian pending finalization of adoption. The requirement that the order creating such a legal guardianship be done "[w]ith the consent of the agency," eliminates any potential conflict between the Department's right to exclusive control and the prerogatives of a legal guardian. The juvenile court's order granting legal guardianship over Raven to her prospective adoptive parents pending finalization of the adoption was proper.

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procedure from interference when it is functioning properly. (*Henwood, supra,* 49 Cal.2d at pp. 643-645.)

[8] The notice of appeal filed on the Judicial Council's approved form states only that Glenn S. appeals from the court's "termination of parental rights November 18, 2002." In the section of the form where he indicated the order appealed from was made pursuant to section 366.26, Glenn S. checked the box for "termination of parental rights," but left blank the box next to "appointment of a guardian." Because we reject on the merits Glenn S.'s argument concerning the concurrent orders for adoptive planning and legal guardianship, we need not address the Department's contention that Glenn S. did not properly preserve his right to appeal from the guardianship order.

DISPOSITION

The orders terminating parental rights and appointing legal guardians are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

PERLUSS, P. J.

We concur:

JOHNSON, J.

MUÑOZ (AURELIO), J.[*]

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[*] Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.